82-1306

No._____

In The

Supreme Court of the United States

October Term, 1982

COLUMBIA GAS OF WEST VIRGINIA, INC.,
Petitioner

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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QUESTIONS PRESENTED FOR REVIEW

1. Does West Virginia's engaging in commercial protectionism constitute a violation of the Commerce Clause of the United States Constitution?

2. Does West Virginia's denying Columbia recovery of Federal Energy Regulatory Commission ("FERC")-approved transportation charges, and instituting standards for disregarding FERC-approved wholesale rates constitute an encroachment upon the FERC's jurisdiction under the Natural Gas Act, and a violation of the Supremacy Clause of the United States Constitution?

3. Does West Virginia's repricing of Columbia's synthetic natural gas purchases in accordance with standards unarticulated at the time of such purchases constitute a deprivation of Columbia's property without due process of law in violation of the Fourteenth Amendment to the United States Constitution?

4. Does West Virginia's action, resulting in a rate of return to Columbia that is admittedly inadequate, constitute a contravention of the constitutional standards enunciated in the *Hope, Bluefield,* and *Permian Basin* decisions of this Court and the *Virginia Electric* decision of the Supreme Court of Appeals of West Virginia, and result in a confiscation of Columbia's assets in violation of the Fourteenth Amendment to the United States Constitution?

5. Does West Virginia's treating of other gas utilities in West Virginia, which are SNG customers involved in a business substantially similar to that of Columbia, differently from Columbia constitute a denial to Columbia of the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES IN COURT BELOW

The Petitioner in the Supreme Court of Appeals of West Virginia was Columbia Gas of West Virginia, Inc.* (Columbia). The Respondent in that Court was the Public Service Commission of West Virginia (the Commission). There were no other parties before the Supreme Court of Appeals of West Virginia in this matter.

*Petitioner is a subsidiary of The Columbia Gas System, Inc., whose other subsidiaries are Columbia Gas System Service Corporation, Columbia LNG Corporation, Columbia Gas Transmission Corporation, Columbia Alaskan Gas Transmission Corporation, Columbia Coal Gasification Corporation, Columbia Hydrocarbon Corporation, The Inland Gas Company, Inc., Columbia Gas of Kentucky, Inc., Columbia Gas of Maryland, Inc., Columbia Gas of New York, Inc., Columbia Gas of Ohio, Inc., Columbia Gas of Pennsylvania, Inc., Columbia Gas of Virginia, Inc., Big Marsh Oil Company, Columbia Gulf Transmission Company, Columbia Gas Development Corporation, Columbia Gas Development of Canada Ltd., Commonwealth Gas Services, Inc., Commonwealth Gas Pipeline Corporation and Commonwealth Propane, Inc.

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The June 28, 1982 Joint Order of the Commission on Reconsideration in Case No. 80-336-G-30C and Final Order in Case No. 81-366-G-30C (A. 25a) has been reported at 47 PUR 4th 392. The August 25, 1982 Commission Order on Petitions for Reconsideration (A. 132a) has been reported at 48 PUR 4th 558. There have been no other reports, official or unofficial, of any opinions delivered in the court or administrative agency below in the proceedings under consideration in the instant Petition.

JURISDICTION OF THIS COURT

The decision of the Supreme Court of Appeals of West Virginia denying Columbia's Petition for Appeal was entered on November 9, 1982. This Petition for a Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS, AND STATUTES INVOLVED

The Constitutional provisions involved in this case, and the page numbers in the Appendix where they are set out verbatim, are the Commerce Clause (A. 142a), the Supremacy Clause (A. 142a), and the Fourteenth Amendment to the United States Constitution (A. 142a). The statutes involved in this case, and the page numbers in the Appendix where they are set out verbatim, are 15 U.S.C §717a(5), at (A. 143a); 15 U.S.C. §717c, at (A. 143a); 28 U.S.C. §1257(3), at (A. 145a); and W. Va. Code §24-2-12 (1980), at (A. 146a).

STATEMENT OF THE CASE

Columbia Gas of West Virginia, Inc. (Columbia), Petitioner herein, sells natural gas at retail in the State of West Virginia. During the natural gas supply emergency of the early 1970's, Columbia's supplier, Columbia Gas Transmission Corporation (Transmission), was experiencing increasing shortfalls in its historic gas supply due to declining volumes available from its Louisiana reserves as well as decreasing deliveries from non-affiliated pipeline suppliers in the southwest. The manufacture and supply of Synthetic Natural Gas (SNG) was one of the many long-range efforts of the Columbia Gas System Companies to develop new gas supplies in order to alleviate the effects of the shortfalls being experienced by Transmission. In 1973, Columbia LNG Corporation (LNG Corporation) entered into contractual agreements with 58 gas distribution companies, only six of which were affiliates of LNG Corporation (including Columbia Gas of West Virginia, Inc.), to manufacture and supply SNG to these companies.

By an Order issued December 10, 1976, the Public Service Commission of West Virginia (Commission) approved

the contract between Columbia and LNG Corporation and gave its consent to Columbia's entering into the contract (A. 1a). The SNG obtained by Columbia and other gas utilities from LNG Corporation was instrumental in easing the difficulties of these utilities in providing adequate gas supplies to meet their customers' needs during the natural gas supply emergency of the 1970's.

The two proceedings before the Commission which gave rise to the judgment of the Supreme Court of Appeals of West Virginia under consideration herein had as their purpose the determination of the gas cost recovery level to be included in Columbia's rates for the periods November 1, 1980 through October 31, 1981 and November 1, 1981 through October 31, 1982, respectively. The two proceedings were commenced with the filing of Purchased Gas Applications with the Commission. The Commission order issued on June 28, 1982, and the August 25, 1982 Commission order affirming it, prohibit Columbia from recovering from its customers approximately $24 million in costs actually incurred in providing SNG to serve its West Virginia customers during the 24-month period ending October 31, 1982. As a result of this disallowance, Columbia's cash position (after Federal Income Tax effect) is permanently reduced by $13 million for the period from November 1980 through October 1982.

The Purchased Gas Application (PGA) covering the period from November 1, 1980 through October 31, 1981 became the subject of Case No. 80-336-G-30C, and the PGA covering the period November 1, 1981 through October 31, 1982 became the subject of Case No. 81-366-G-30C. The Commission issued a Final Order in Case No. 80-336-G-30C on October 30, 1981 (A. 2a). Subsequently, on December 18, 1981, the Commission granted Columbia a rehearing of this case and, for that purpose, consolidated it with Case No. 81-366-G-30C (A. 22a).

Columbia's expenditures for purchased gas in both cases included expenditures for SNG purchased under the 1974 contract.

On June 28, 1982 the Commission issued its Joint Order on Reconsideration in Case No. 80-336-G-30C and Final Order in Case No. 81-366-G-30C. (A 25a) Despite its December 10, 1976 Order, the Commission concluded that Columbia had violated W. Va. Code §24-2-12(f) (1980) by failing to obtain the Commission's approval prior to entering into the SNG contract with LNG Corporation, an affiliated company. The Commission further concluded that the SNG contract adversely affects the public in the State of West Virginia. The Commission repriced for ratemaking purposes the SNG purchased by Columbia during the 24-month period November 1, 1980 through October 31, 1982 to the average price at which Columbia acquired natural gas from its principal supplier, Transmission.

On the basis of its conclusions regarding the current gas acquisition program of Columbia, the Commission instituted four "new standards" which would be applied in Columbia's next purchased gas application proceeding.*

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*The Commission stated:

In its next purchased gas cost proceeding before this Commission, Columbia shall present evidence to demonstrate its compliance with the following: (a) the use of bids for the purchase of some significant quantity of natural gas supplies needed to fulfill its customer requirements; (b) Columbia's efforts to purchase West Virginia produced natural gas; (c) evidence in support of Columbia's burden to demonstrate that dependable lower-priced supplies of natural gas are not readily available from other sources and that Columbia's contracts with affiliated corporations are not detrimental to Columbia's customers; and (d) efforts which Columbia has taken to more adequately represent the interests of its West Virginia jurisdictional customers in the Columbia Gas System, as opposed to subordinating the interests of its West Virginia service area to those of the Columbia Gas System as a whole, all as set forth previously in this order. (A. 126a).

The Commission flatly declared that Columbia's performance measured against these standards would furnish a basis for the Commission to refuse cost recovery to some increment of Columbia's purchases from Transmission at FERC-approved "just and reasonable" rates under Section 4 of the Natural Gas Act, 15 U.S.C. §717c. (A. 106a).

Columbia petitioned the Commission for reconsideration of its June 28, 1982 Order on July 28, 1982. In that Petition, Columbia raised all five of the constitutional issues contained in this Petition for a Writ of Certiorari. In addition, Columbia appealed to the Supreme Court of Appeals of West Virginia, raising all five issues contained in the instant Petition. The Commission responded to Columbia's Petition for Reconsideration in an Order issued on August 25, 1982. (A. 132a). The Commission made one modification of its June 28, 1982 Order in response to Columbia's argument that the new gas procurement standards articulated by the Commission were offensive to the Commerce Clause of the United States Constitution. The repricing standard, to be applied if Columbia does not demonstrate to the Commission's satisfaction "that dependable lower-priced supplies of natural gas are not readily available from other sources" (A. 104a), was changed from "the reasonable cost of natural gas which is determined to be readily available within the State of West Virginia" (A.104a), to "the reasonable cost of natural gas which is determined to be otherwise readily available" (A. 136a). Apart from this modification, the Commission rejected the Constitutional arguments raised by Columbia, denied its Petition for Reconsideration and affirmed (with the single modification noted) its Order of June 28, 1982.

Columbia again raised all five of the Constitutional

issues contained in this Petition for a Writ of Certiorari on September 24, 1982, in a Petition for Appeal which it presented to the Supreme Court of Appeals of West Virginia. On November 9, 1982, the Supreme Court of Appeals refused to hear the appeals then pending in that Court (A 138a, and A. 140a).

REASONS FOR ALLOWANCE OF THE WRIT

I. WEST VIRGINIA HAS ENGAGED IN COMMERCIAL PROTECTIONISM IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

The Public Service Commission of West Virginia (Commission) has committed two acts repugnant to the Commerce Clause of the United States Constitution. Columbia Gas of West Virginia, Inc. (Columbia) raised its objection to both these acts before the Supreme Court of Appeals of West Virginia in its Consolidated Petition for Appeal of the Commission's Orders of June 28, 1982 and August 25, 1982. The Supreme Court of Appeals denied Columbia's Petition for Appeal.

First, the Commission interpreted W. Va. Code§24-2-12(f) (1980)as requiring prior Commission approval of a transaction *in interstate commerce* entered into between Columbia and an affiliated company, Columbia LNG Corporation (LNG Corporation). Then, the Commission found that this transaction, a ten-year contract for the supply and purchase of SNG, adversely affects the public in the State of West Virginia. Having made this finding, the Commission partially voided the SNG contract and repriced, for ratemaking purposes, gas purchased by Columbia under the contract to the average price level of the natural gas Columbia acquired from its principal supplier, Columbia Gas Transmission Corporation (Transmission).

Second, the Commission has enunciated new standards by which Columbia's practices of acquiring natural gas will be examined in future regulatory proceedings.[1] One of these standards is that Columbia "should make a substantial effort to purchase West Virginia produced natural gas, making much the same commitment as has been made by Hope Natural Gas Company . . . ."(A. 104a). Another standard places on Columbia " the burden of demonstrating that dependable lower-priced supplies of natural gas are not readily available from other sources . . . ." *Id.* In elaboration of this standard, the Commission threatened in its June 28, 1982 Order that it might reprice gas acquired by Columbia "to the reasonable cost of natural gas which is determined to be readily available within the State of West Virginia." *Id.* The Commission's Order of August 25, 1982 modified this language, removing the specific reference to West Virginia and threatening to reprice to the level of gas "otherwise readily available." The modification, however, fails to achieve the Commission's expressed intention of "insur[ing] that the standards . . . do not impose a burden on interstate commerce . . ." (A. 136a).

These two acts of the Commission fly in the face of the Commerce Clause and past decisions of this Court and lower federal courts. The contract between Columbia and

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[1] It appears that the standards may be applied, however, to any of Columbia's practices which are examined in such future proceedings, not merely those which have occurred subsequent to the Commission's enunciation of the new standards. Thus, in addition to the substance of some of the new standards violating the Commerce Clause, the application of these standards to Columbia's conduct without prior notice violates the Due Process Clause of the Fourteenth Amendment. This same due process defect is discussed with regard to the Commission's SNG repricing standard in the Fourth Reason for Granting the Writ, beginning at page 21 of this petition.

LNG Corporation is unquestionably a transaction in interstate commerce. By asserting the right to approve or disapprove it, the Commission arrogates to itself the power of interfering directly with such commerce. States have no authority to prescribe the rates or prices to be charged for utility commodities transferred in interstate commerce or to prevent utilities from fulfilling their contractual obligations in interstate commerce. *Kansas Corporation Comm. v. Wichita Gas Co.*, 290 U.S. 561 (1934); *Tri-State Generation & Transmission Ass'n., Inc. v. Public Service Commission of Wyoming*, 412 F. 2d 115 (10th Cir. 1969), *cert. denied*, 397 U.S. 1043 (1970).

The new gas procurement standards announced by the Commission seek specifically to put West Virginia gas in a favored position vis-a-vis gas produced in other states and transported in interstate commerce. One standard would have Columbia make a "commitment" to purchase West Virginia gas. Even with the modification of language made by the Commission's Order of August 25, 1982, the repricing standard can still be used to favor local gas by prohibiting a utility from recovering any amount by which the cost of non-local gas exceeds that of local gas. These standards are obvious manifestations of parochialism. They would protect a set of supposed local interests at the expense of a national common market in gas. They are incompatible with the recent decisions of this Court. *Hunt v. Washington Apple Advertising Comm.*, 432 U.S. 333 (1977); *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

If this Court fails to prohibit the State of West Virginia, through its Public Service Commission and Supreme Court of Appeals, from deciding for itself how much interstate trade it will permit within its boundaries and what barriers it will raise to protect its indigenous population and industries, other states may not wait long

before responding in kind. For the sake of the constitutional goal of unencumbered national trade, such commercial protectionism must be struck down.

II. WEST VIRGINIA HAS DENIED COLUMBIA RECOVERY OF FERC-APPROVED TRANSPORTATION CHARGES, AND HAS INSTITUTED STANDARDS FOR DISREGARDING FERC-APPROVED WHOLESALE RATES, THEREBY ENCROACHING UPON THE FERC'S JURISDICTION UNDER THE NATURAL GAS ACT IN VIOLATION OF THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION.

In addition to repricing SNG to the average commodity rate charged for natural gas by Columbia's principal supplier, the Commission denied Columbia recovery of the transportation charges it paid on SNG purchased during the period November 1, 1980 through October 31, 1982 (A. 82a). These charges are charges for the transportation of mixtures of natural and artificial gas; they were approved by the FERC, which has exclusive authority to set such charges. 15 U.S.C §§717a(5) and 717c. Columbia informed the Supreme Court of Appeals of West Virginia that the Commission's rejection of the FERC-approved transportation charges amounted to a violation of the Supremacy Clause of the United States Constitution. The Supreme Court of Appeals denied Columbia's Petition for Appeal.

Just as clearly, the Natural Gas Act commits the matter of sale for resale of natural gas in interstate commerce to the FERC, by virtue of §§717a(5) and 717c of the Natural Gas Act. The repricing "standards" adopted by the Commission for prospective application to Columbia's wholesale purchases from Transmission at "just and reasonable" wholesale rates established by the FERC

constitute an ongoing violation of the Supremacy Clause of the United States Constitution. The standards impose a chilling effect on Columbia's wholesale purchases of gas in interstate commerce.

In enacting the Natural Gas Act, Congress indicated its intention to bring under exclusive federal jurisdiction the regulation of interstate commerce in natural gas. The Federal Power Commission and, subsequently, the Federal Energy Regulatory Commission, were given sole authority to inquire into and establish reasonable rates and charges with respect to such commerce. 15 U.S.C. §717c. The FERC has established the transportation charge for mixtures of natural and synthetic gas which Columbia incurred and the Commission has denied in this case. The Commission's denial constitutes a challenging of a rate validly established by the FERC in the exercise of its exclusive jurisdiction and, therefore, an assertion of state power in an area which has been preempted by the federal government.

This Court has not ruled on the precise issue of a state regulatory agency's refusal to recognize as a reasonable operating expense an expense for gas purchased or transported in interstate commerce at a FERC-approved rate. A number of state supreme courts, however, have considered this issue in the context of wholesale rates and have concluded that the Natural Gas Act preempts any such power. *Citizens Gas Users Ass'n v. Public Utilities Commission of Ohio,* 165 Ohio St. 536, 138 N.E.2d 383 (1956); *United Gas Co. v. Mississippi Public Service Commission,* 240 Miss. 405, 127 S.2d 404 (1961); *Narragansett Electric Co. v. Burke,* 381 A.2d 1358 (R.I. 1977); *Northern States Power Co. v. Hagen,* 314 N.W.2d 32 (N.D. 1981).

Although SNG itself is not a commodity the sale and transportation of which is regulated by the FERC, SNG

mixed with natural gas is subject to the interstate transportation rate established by the FERC. The FERC is the only forum in which the reasonableness of that rate may be reviewed. To permit state commissions to second-guess the FERC and recognize only a part of the FERC transportation rate as a reasonable expense of a public utility would bring conflict and chaos to an area which Congress has reserved for the consistency and uniformity of federal regulation. The Supremacy Clause requires that this aim of Congress not be defeated by the encroachment of individual states.

The repricing standards announced by the Commission in the June 28, 1982 order are similarly incompatible with the exercise by the FERC of its exclusive jurisdiction to determine "just and reasonable" wholesale rates. Any repricing of natural gas purchased for resale in interstate commerce by a State regulatory commission amounts to a hindsight judgment by that state commission that the FERC had failed to establish a "just and reasonable" wholesale rate. In fact, the wholesale rate established by the FERC is the *only* reasonable rate for purchases of natural gas from Transmission which Columbia can claim as appropriate. *Montana-Dakota Utility Co. v. Northwestern Public Service Company*, 341 U.S. 246, 251-252 (1951). The repricing standards would disrupt the comprehensive national scheme of regulation of natural gas sales for resale in interstate commerce. The Supremacy Clause requires that this state encroachment be repelled.

III. WEST VIRGINIA HAS REPRICED SYNTHETIC NATURAL GAS PURCHASED BY COLUMBIA IN ACCORDANCE WITH STANDARDS UNARTICULATED AT THE TIME OF SUCH PURCHASES, THUS DEPRIVING COLUMBIA OF PROPERTY WITHOUT DUE PROCESS OF LAW.

In its Order of June 28, 1982 the Public Service Commission of West Virginia ruled that Columbia could not recover in rates any of the amounts it expended on SNG in the 24-month period ended October 31, 1982 in excess of the price Columbia's principal supplier would have charged for like quantities of natural gas. This repricing of SNG by the Commission denies Columbia recovery of a staggering $24 million of the $52 million which it spent on SNG during that period.

The basis of the Commission's repricing decision was its conclusion that Columbia's SNG contract adversely affected the public in the State of West Virginia and should, therefore, be considered void under W. Va. Code §24-2-12 (1980) to the extent that the public was adversely affected.

Columbia submitted its SNG contract to the Commission, at the Commission's request, in 1976. At that time the Commission determined that the terms and conditions of the contract were reasonable, that no party was given an undue advantage over another, and that the public was not adversely affected. The Commission then authorized Columbia to enter into the contract (A. 1a). On June 28, 1982, however, the Commission decided that the public now was adversely affected and that Columbia should, therefore, be penalized some $24 million. Columbia argued to the Supreme Court of Appeals of West Virginia that the Commission's repricing of SNG without any prior articulation of standards (the violation of which would necessitate such repricing) would deprive it of property without due

process of law. The Supreme Court of Appeals denied Columbia's Petition for Appeal.

This Court has made it clear that a state regulatory agency must posit "criteria more discriminating than justice and arbitrariness" in its ratemaking decisions. *Permian Basin Area Rate Cases,* 390 U.S. 747, 790 (1968). This articulation of criteria is necessary for two reasons: first, it provides the utility regulated by the agency with notice of the standards by which it will be judged; second, it provides the court reviewing the agency's decisions with the self-expressed standards on which the agency acted, a prerequisite to the court's discharging its duty of judicial review.

Columbia in this case was denied the benefit of any prior articulation of standards. It knew only that in 1976 the Commission had examined its SNG contract and found it to be unexceptionable. It had no notion that the Commission could attempt years later, as it has done, to repudiate its approval of that contract—which was a ten-year contract when the Commission bestowed its blessing on it and is a ten-year contract still. Even if Columbia had known that the Commission would, or even could, retract its imprimatur at this late date, it had no way of predicting the standards by which a rejudging of the contract would be made.

Columbia's inability to divine the standards which the Commission had failed to state has resulted in the effective confiscation of $24 million expended in good faith by Columbia to provide its customers with needed supplies of gas. This deprivation of property without notice of standards by the Commission is inimical to the concepts of fundamental fairness and justice contained in the Fourteenth Amendment's guarantee of due process.

The Commission's standard for finding Columbia's SNG contract unreasonable was also a new standard of which Columbia had no notice until the Commission imposed the repricing standard which was affirmed in its June 28, 1982 Order. Due process requires that Columbia not be deprived of its property on the basis of a standard of which it did not and could not have had any knowledge.

IV. WEST VIRGINIA'S ACTION RESULTED IN A RATE OF RETURN TO COLUMBIA ON ITS INVESTMENT THAT IS ADMITTEDLY INADEQUATE, IN CONTRAVENTION OF THE CONSTITUTIONAL STANDARDS ENUNCIATED IN THE *HOPE*, *BLUEFIELD* AND *PERMIAN BASIN* DECISIONS OF THIS COURT AND THE *VIRGINIA ELECTRIC* DECISION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, WHICH RESULTS IN A CONFISCATION OF COLUMBIA'S ASSETS IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In *Virginia Electric and Power Co. v. Public Service Commission*, ____ W. Va. ____, 242 S.E.2d 698 (1978), the Supreme Court of Appeals of West Virginia enunciated the following criteria for the end result that must follow any methods of determining rates that the Commission adopts:

> The Public Service Commission may employ such methods for determining utility rates as it deems suitable, so long as the end result guarantees West Virginia good service at fair rates and enables utilities to earn a competitive return for their stockholders upon their investment in West Virginia.

(Syllabus, 242 S.E.2d at 699)

In its June 28, 1982 Order, the Commission endorses an earlier discussion of its duties consistent with holdings of this Court in *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), as to the maintenance of financial integrity of jurisdictional utilities A. 68a). The Commission also states that its SNG repricing decision will undoubtedly result in a reduction of Columbia's achieved rate of return (A 67a) and that the disallowance may result in "the utility's earning an otherwise inadequate rate of return" (A. 69a). In Conclusions of Law 22 through 25, the Commission held that the *Hope* and *Permian Basin* general standards are not applicable in the instant case. (A. 120a).

The Commission's Orders omit any reference to another landmark decision of this Court in *Bluefield Water Works and Improvement Company v. Public Service Commission*, 262 U.S. 679 (1923), where the Court stated:

> Rates which are not sufficient to yield a reasonable return on the value of the property used at the time it is being used to render the service are unjust, unreasonable and confiscatory, and their enforcement deprives the public utility company of its property in violation of the 14th Amendment. This is so well settled by numerous decisions of this Court that citation of the cases is scarcely necessary.

262 U.S. at 690. This Court illustrated the interest of the utility in the adequacy of its return as follows:

> The return should be reasonably sufficient to assure confidence in the financial soundness of

> the utility and should be adequate, under efficient and economic management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

262 U.S. at 693.

The major premise of the SNG repricing decision in these cases may be restated as follows: Because Columbia entered a gas supply contract in 1973, under which, from November 1980 through October 1982, purchases were made at a "high" price when "lower" priced alternative supplies might have been purchased in the absence of the contractual obligation, the contract price paid was unjust and unreasonable, and the Commission need not concern itself with the inadequacy of Columbia's return as a result of voiding the contract for ratemaking purposes, since "financial integrity for ratemaking purposes" can ignore the impact of disallowed operating expenses (A. 120a). The *Hope*, *Bluefield*, and *Permian Basin* decisions of this Court provide no support for this view. In fact, the excerpt from *Permian Basin* set forth in the June 28, 1982 Final Order (A. 68a) is misleading concerning the standard of review of a rate order properly to be applied, in that the following critically important statement was omitted:

> *The Court's responsibility is* not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead

> *to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.* (emphasis added)

390 U.S. at 792.

The Orders' discussion relating to inadequacy of return compels the conclusion that "reasoned consideration" has not been given either to Columbia's contractual obligation to purchase SNG, or to Columbia's financial integrity, its ability to attract necessary capital and fairly compensate investors for risks they have assumed. The penalty levied on Columbia has not only been wrongfully and unlawfully imposed, but it has also been imposed with the Commission's frank admission that it deems it unnecessary even to consider the resulting inadequate return. This Court must invalidate the Commission's warped interpretation of the controlling cases and reaffirm the concept that a utility may not be compelled to serve for a demonstrably inadequate return. Such compulsion amounts to confiscation in violation of the Fourteenth Amendment to the United States Constituton.

V. WEST VIRGINIA HAS DENIED COLUMBIA THE EQUAL PROTECTION OF THE LAW GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE OTHER GAS UTILITIES IN WEST VIRGINIA WHICH ARE SNG CUSTOMERS, INVOLVED IN A BUSINESS SUBSTANTIALLY SIMILAR TO THAT OF COLUMBIA, ARE TREATED DIFFERENTLY FROM COLUMBIA.

There are four other gas companies in West Virginia (Bluefield Gas, Shenandoah Gas, Blacksville Gas and Cameron Gas Companies) which are SNG customers and

whose business is substantially similar to that of Columbia[7], except that Columbia has considerably larger sales volumes than these other four companies.[8] Despite the substantial similarities among these gas utilities, the Commission approved full cost recovery for the SNG purchases of the other four gas utilities and singled Columbia out for cost disallowance.

In striking down legislation which could be applied to but one company, this Court has stated:

> . . . if once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost . . .

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[7] For example, the percentage of SNG in total gas supplies of Shenandoah, Bluefield, and Columbia are approximately the same. Moreover, for Shenandoah and Bluefield, as for Columbia, the per unit cost of SNG is higher than the per unit cost of the gas supplied each of them by Transmission. A Commission Staff witness testified at the hearing that the impact of the cost of SNG purchased by Shenandoah and Bluefield upon their customers is "approximately the same" as the impact of the cost of Columbia's SNG purchases upon its customers.

[8] The Commission attempted to rationalize its different treatment of Columbia on the basis of Columbia's size and its greater sales volumes (A. 75a). While it has been held that distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved, such distinctions cannot be so justified if the discrimination has no reasonable relationship to the difference. *Morey v. Doud*, 354 U.S. 457, 466 (1957). Where the size of the entity is not "an index to an admitted evil," the Equal Protection Clause of the United States Constitution will not permit discrimination between the "great and the small." *Engel v. O'Malley*, 219 U.S. 128, 138 (1911).

> this statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would . . .

Cotting v. Kansas City Stockyards Company, 183 U.S. 79 at 112 (1901). In like manner, the singling out of Columbia on the basis of the volume of gas it delivered and sold to West Virginia jurisdictional customers, without any distinction relative to the quality or value of service rendered by Columbia and other SNG purchasers, patently denies Columbia the equal protection of the law.

While it is true that Bluefield, Shenandoah, Blacksville, and Cameron are not affiliates of LNG Corporation, whereas Columbia is an affiliate, this affiliation provides no lawful basis for the discriminatory treatment of Columbia vis-a-vis the other SNG purchasers. First, 52 non-affiliated distribution companies have SNG purchase agreements with LNG Corporation on terms and conditions identical, except for contract volumes, to those in Columbia's SNG purchase agreement.[4] Second, the Commission's action on December 10, 1976 in approving the SNG contract eliminated any basis for the distinction which the Commission has made. As the Maryland Public Service

[4] Fourteen of Columbia Transmission's 75 wholesale customers declined to enter into SNG purchase agreements with Columbia LNG. One of those customers which did not enter into an SNG purchase agreement was Columbia Gas of Virginia, Inc.—one of Columbia's affiliates.

Commission observed in response to the Maryland People's Counsel argument that the cost of SNG should not be included in the purchased gas adjustment calculation of Columbia Gas of Maryland, Inc., because of its affiliation with Columbia LNG:

> With respect to People's Counsel's contention that Greensprings (sic; Green Springs) SNG charges should be excluded from Columbia Gas' PGA charges, the hearing Examiner properly concluded that under the circumstances, this unregulated affiliate transaction could be reflected in the PGA computation. *Since the provisions of the contract with each distribution company (affiliates and non-affiliates alike) are identical, Columbia Gas' contract for gas is, in effect, the result of an independent arms-length transaction. We agree with the Hearing Examiner that to remove the SNG charges from Columbia Gas' SNG (sic; PGA) computation would be arbitrary.*

In the matter of Purchased Gas Adjustment Costs Charged to Customers by Gas Utility Companies, Case No. 6865, Order No. 64435, September 15, 1980, p. 8. (emphasis added)

In summary, there is no reason for the Commission to have treated Columbia differently from the other four West Virginia gas utilities with respect to cost recovery for purchased SNG volumes, and to do so was a denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The SNG repricing, and the adoption of new standards by the West Virginia Public Service Commission fly in the face of the Commerce Clause, the Supremacy Clause and the Fourteenth Amendment to the United States Constitution. Moreover, the issues raised have farreaching implications for the natural gas industry. Therefore, your Petitioner respectfully prays for the issuance of a Writ of Certiorari to the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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